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ROOM 451 • CITY & COUNTY BUILDING
DENVER COLORADO • 80202
PHONE: (303) 640-3012
FAX: 640 2636

April 10, 1996

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20054

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Dear Mr. Caton

The enclosed is submitted on behalf of the City and County of Denver, Colorado ("City") to be included as part of the Reply Comments to the Federal Communications Commission in its Notice of Proposed Rulemaking, CS Docket No. 96-46.

The original and nine (9) copies are enclosed. Please contact me at the above address and telephone number if additional information is needed to properly evaluate the enclosed materials.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cathy Reynolds".

Cathy Reynolds
At-Large City Councilmember and
Chair, City Council Special Projects Committee

Enclosure

cc: Larry Walke, Cable Services Bureau, FCC
International Transcription Services

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

APR 11 1996

In the Matter of)

Implementation of Section)
302 of The Telecommunications)
Act of 1996)

CS Docket No. 96-46

Open Video Systems)

DOCKET FILE COPY ORIGINAL

In the Matter of)

Telephone Company-)
Cable Television)
Cross-Ownership Rules,)
Sections 63.54-63.58)

CC Docket No. 87-266
(Terminated)

REPLY COMMENTS OF THE CITY AND COUNTY OF DENVER, COLORADO

Alonzo Matthews
Manager
General Services Administration

Deborah L. Ortega
President
City Council

City and County of Denver
1330 Fox Street
2nd Floor
Denver, CO 80204

Cathy Reynolds
City Councilwoman and
Chair, Special Projects Committee

City and County of Denver
City and County Building
Denver, CO 80202

April 10, 1996

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REPLY COMMENTS OF THE CITY AND COUNTY OF DENVER, COLORADO

I. SUMMARY AND INTRODUCTION

On April 1, 1996, the City and County of Denver, Colorado ("City") and a number of other respondents filed Comments with the Federal Communications Commission ("FCC" or "Commission") in its Notice of Proposed Rulemaking in CS Docket No. 96-46 ("OVS NPRM") in response to the Commission's Request for Comments on, among other issues, implementing the provisions in the Telecommunications Act of 1996 ("1996 Act") that pertain to Public, Educational and Governmental ("PEG") access obligations for Open Video System ("OVS") operators; whether cable operators should be permitted to become OVS operators and the OVS certification process. A review of these Comments indicates that the City, other local governments, government organizations, community and consumer groups, PEG programmer organizations and members of the cable industry believe that OVS operators should provide PEG obligations that are the same as, or equivalent to, that

provided by the incumbent cable operator. These commentators and some members of the telephone industry also note that local governments can and should play a significant role in the determination of how PEG obligations are met at the local level. Many of these same commentators note that PEG services should be provided to all subscribers to the OVS system and also note that the proper structuring of the OVS certification process can help ensure that local communication requirements are met.

As could be predicted, cable operators feel strongly that they should be allowed to convert their systems into OVS while the telecommunications industry appears, at best, to be lukewarm to such an idea. As many government, community and consumer groups have pointed out, such an allowance would be in stark contrast to Congress' intent that OVS stimulate intersystem competition. As could also be predicted, the telephone industry appears to desire complete control of the allocation of analog versus digital capacity. However, as a number of government and cable industry commentators correctly note, such an enabling provision in the Commission's rules would act to severely inhibit program diversity and the expansion of competitive, unaffiliated programmers on the OVS platform.

Based on its review of a significant number of comments in this proceeding, the City herein reemphasizes the points made in its Comments filed on April 1, 1996.¹ The City finds significant support for its views in, among others, the Comments of NLC, et al.², the

¹ See generally, Comments of the City and County of Denver, Colorado, in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated March 29, 1996.

² See generally, Comments of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida ("NLC, et al."), in Notice of Proposed Rulemaking, CS

Comments of the Coalition³, the Comments of the Texas Cities⁴, the Comments of the Minnesota Cities⁵, the Comments of Olathe⁶, the Comments of NYC⁷, the Comments of New York State⁸ and the Comments of New Jersey⁹. The City also finds significant support for its views in the Comments of both cable and telephone industry respondents, including the Comments of the NCTA¹⁰, the Comments of Time Warner¹¹,

Docket No. 96-46 dated April 1, 1996.

³ See generally, Comments of the Alliance for Community Media; Alliance for Communications Democracy; Consumer Federation of America; Consumer Project on Technology; Center for Media Education; and People for the American Way ("Coalition"), in Notice of Proposed Rulemaking, CS Docket 96-46, dated April 1, 1996.

⁴ See generally, Comments of the Cities of Dallas, Texas; Denton, Texas; Houston, Texas; Plano, Texas; Fort Worth, Texas; Arlington, Texas; Irving, Texas; Longview, Texas and Brownfield, Texas ("Texas Cities"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

⁵ See generally, Comments of the Below Named Political Subdivisions of the State of Minnesota ("Minnesota Cities"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

⁶ See generally, Comments of the City of Olathe, Kansas ("Olathe"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

⁷ See generally, Comments of the New York City Department of Information Technology and Telecommunications ("NYC"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

⁸ See generally, Comments of the State of New York, Department of Public Service ("New York State"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

⁹ See generally, Comments of the State of New Jersey, Board of Public Utilities' Office of Cable Television ("New Jersey"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

¹⁰ See generally, Comments and Petition for Reconsideration of the National Cable Television Association, Inc. ("NCTA"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

¹¹ See generally, Comments of Time Warner Cable ("Time Warner"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

the Comments of Cablevision/CCTA¹², the Comments of US West¹³ and the Comments of MFS¹⁴. The City, however, does differ from the views of these commentators on certain issues as noted further herein.

The City takes significant issue with the comments of NYNEX¹⁵ and the Comments of the Joint Parties¹⁶. The City is disappointed that these commentators seem to disregard Congressional intent concerning the structuring of OVS, especially as it relates to the fundamentally local nature of certain programming, like PEG access, that is specified for inclusion on such systems. Further, the City believes that these two commentators' positions, as well as similar positions of other commentators, are not supported by the preponderance of evidence in this proceeding.

II. DISCUSSION

In its Comments, the City addressed the need for a number of key elements to be incorporated into the Commission's rules regarding the implementation of OVS in order to

¹² See generally, the Joint Comments of Cablevision Systems Corporation and the California Cable Television Association ("Cablevision/CCTA"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

¹³ See generally, Comments of US West, Inc. ("US West"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

¹⁴ See generally, Comments of MFS Communications Company, Inc. ("MFS"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

¹⁵ See generally, Comments of NYNEX Corporation ("NYNEX"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

¹⁶ See generally, Comments of Bell Atlantic Telephone Companies and Bell Atlantic Video Services Company; BellSouth Corporation and BellSouth Telecommunications, Inc.; GTE Service Corporation and its affiliated domestic telephone operating companies and GTE Media Ventures, Inc.; Lincoln Telephone and Telegraph Company; Pacific Bell; SBC Communications Inc. and Southwestern Bell Telephone Company ("Joint Parties"), in Notice of Proposed Rulemaking, CS Docket No. 96-46, dated April 1, 1996.

ensure that the public interest is properly served. These key elements are echoed by a number of commentors as described in the following discussion:

A. OVS Operators Should Provide Existing And Future PEG Capacity, Facilities, Equipment And Operational Support That Is The Same Or Equivalent To That Provided By Incumbent Cable Operators

A variety of commentors concur with the City's view that the Commission must establish a framework for the provision of PEG services and support on OVS that is the same or equivalent to PEG services and support provided by cable operators in order to ensure that PEG programmers are able to provide the same quality and diversity of programming to both OVS and cable system subscribers.¹⁷ For example, NLC, et al., states that, "The matching obligation of an OVS operator with respect to PEG must be cumulative with the PEG operations of the cable operator"¹⁸ and further indicates, "At the same time we recognize that, in some cases, it may be more practical and cost-effective to allow an incumbent cable operator and an OVS operator to have different (but equivalent), rather than identical PEG obligations."¹⁹ Consistent with the City's Comments²⁰, NLC, et al.²¹, further indicates that equivalent obligations may need to be negotiated between the franchising authority and the OVS operator. Many other commentors support these same conclusions, including the Minnesota Cities²², Texas Cities²³ and the Coalition²⁴.

¹⁷ City Comments at 4-5.

¹⁸ NLC, et al., Comments at 35.

¹⁹ Id.

²⁰ City Comments at 5.

²¹ NLC, et al., Comments at 36.

²² Minnesota Cities Comments at 7-8.

²³ Texas Cities Comments at 8.

A number of industry commentators agree. For example, Time Warner indicates that, "The Act explicitly requires that OVS operators provide public, educational or governmental ("PEG") channels and support for such channels pursuant to Section 611 on the same basis as cable operators."²⁵ NCTA and Cablevision/ CCTA concur and also agree with the City that interconnection and capital and operating expense sharing requirements are inconsistent with the intent of the 1996 Act.²⁶

NCTA goes further to appropriately acknowledge the critical role of the local franchising authority in achieving the goals of PEG access. Specifically, it states, "Localities, not the FCC, are in the best position to deliver on the Act's intent to accomplish PEG access over open video systems."²⁷ US West concurs on the important role of local governments when it states, "The Commission should not adopt any rules that would limit the ability of OVS operators to work out with local government officials mutually acceptable arrangements for delivery of PEG channels, just as cable operators are able to do."²⁸

The City also finds much support for its views regarding future PEG requirements for OVS operators. Specifically concerning future PEG obligations, commentators such as NLC, et al., Olathe and NYC believe, as the City does, that an OVS operator's PEG requirements must continue to be consistent with those of the incumbent cable operator, even as capacity, facility, equipment and funding provisions may be upgraded as part of a

²⁴ Coalition Comments at 8-9.

²⁵ Time Warner Comments at 25.

²⁶ NCTA Comments at 34, Cablevision/CCTA at 21-22.

²⁷ NCTA Comments at 33.

²⁸ US West Comments at 18.

cable television franchise renewal or for any other reason.²⁹ As NLC, et al., notes, any conclusion by the Commission to the contrary "would do violence to the renewal provisions of the Cable Act by interfering with the community's ability to upgrade its PEG requirements as contemplated by 47 USC Section 546, and would tend to produce a competitive imbalance between the cable and OVS operators."³⁰

As could be expected, some members of the telephone industry argue for bare minimum PEG requirements. In response, the City believes it is incumbent upon the Commission to remember that Congress called for "reduced" regulatory burdens for OVS which does not mean a near-elimination of requirements. Moreover, Section 611 requirements, as the Commission has noted, are specifically to be "no greater or lesser than the obligations" of the incumbent cable provider. In this vein, it is clear that the Commission must reject such specific notions as that of NYNEX that an "OVS operator's obligation to provide PEG capacity under the statute does not carry with it any obligation to provide studio facilities, personnel, funding or other commitments the local cable operator may have made in its franchise."³¹ Quite to the contrary of NYNEX's assertion, Section 611 specifically states, "A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities or equipment proposed by the cable operator which relate to public, educational or

²⁹ City Comments at 5-6; NLC, et al., Comments at 32-33 and Footnote 43; Olathe Comments at 5-6; NYC Comments at 7.

³⁰ NLC, et al., Comments at 33.

³¹ NYNEX Comments at Footnote 42.

governmental use of channel capacity, whether or not required by the franchising authority."³² The statute is clear on its face that it pertains to both channel capacity and requirements related to the provision or use of PEG channel capacity, including services, facilities or equipment. Additionally, in the 1996 Act, Congress did not choose to narrow the interpretation by stating that OVS operators were only subject to capacity obligations when it easily could have done so. In light of all this, the Commission must concur with the overwhelming majority of commentors who agree that Section 653(c)(1)(B) applies to all manner of PEG obligations.

B. PEG Services Should Be Provided To All Subscribers To The OVS System Regardless Of The Other Programming That They Receive

Many commentors agree with the City that it would be inconsistent with Congressional intent if PEG programming was not provided to all subscribers to the OVS system. For example, NLC, et al., comments that, "The provision of OVS PEG channels to all subscribers would be consistent with the Act's requirement that OVS operators' PEG obligations be no less than the PEG obligations of cable operators."³³ Additionally, Minnesota Cities states that, "The Open Video System operator should be required to carry the required PEG access channels as part of its programming package"³⁴ and that PEG channels should also "be available on an a la carte basis apart from any of the other

³² See 47 USC 531(c).

³³ NLC, et al., Comments at 42.

³⁴ Minnesota Cities Comments at 11.

programming package selections made by a subscriber."³⁵ Alternatively, US West suggests that all video program providers include PEG channels as part of their basic packages.³⁶

Regarding the inclusion of PEG services as part of any system navigational devices, commentors such as the Coalition agree that it is critical that all subscribers to OVS be able to find and watch PEG access channels.³⁷

C. Cable Operators Should Not Be Allowed To Convert Their Cable Systems Into OVS

Many commentors agree with the City's view that cable operators should not be allowed to convert cable systems into OVS,³⁸ including local governments, community groups, state governments, government organizations and consumer groups.³⁹ These commentors indicate that there are both legal constraints and public policy reasons that act to prohibit cable operators from becoming OVS operators. Specifically, as the Coalition points out, the plain reading of the statute indicates that it applies to "video programming services by telephone companies" and is supported by the legislative history.⁴⁰ Additionally, as New Jersey shows, any action by the Commission allowing cable operators to convert their systems into OVS would not further the statutory goal of enhancing competition and maximizing consumer choice but would, instead, have the exact opposite effect. As New

³⁵ Minnesota Cities Comments at 12.

³⁶ US West Comments at 19 and 20.

³⁷ Coalition Comments at 34.

³⁸ City Comments at 7-8.

³⁹ Texas Cities Comments at 6-7 and Footnote 14; NYC Comments at 3-4; NLC, et al., Comments at 46-47; Coalition Comments at 36-37; Minnesota Cities Comments at 13-15; New York State Comments at 6; and New Jersey Comments at 3-7.

⁴⁰ Coalition Comments at 36-37 and Footnote 48.

Jersey correctly indicates, such an action would "have the effect of increasing the advantage cable operators already have, an advantage which Congress has sought to rectify."⁴¹

It is notable that the telephone industry seems only lukewarm about the prospects of cable operator-based OVS, with a number of telephone industry respondents focusing instead on opposition to cable operators being allowed to obtain space on competitors' OVS platforms for the distribution of their services. In fact, MFS goes so far to state that, "There is no need for the Commission to provide for an opportunity for a cable operator to avoid developing its own alternative infrastructure, or to risk the competitive harm which would result from requiring an OVS operator to permit access to transmission facilities by the incumbent cable provider."⁴²

In contrast, cable industry commentators appear to wish to preserve their options going forward and, therefore, desire to both act as OVS operators and provide programming over competitors' OVS platforms. From the large preponderance of comments, however, it is clear that the cable industry's desires would have the effect, at a minimum, of decreasing intersystem competition which is distinctly contrary to Congressional intent. Cable industry commentators, such as NCTA, raise the argument that they should be able to provide OVS service when they act as local exchange carriers. However, this assertion fails to recognize that Congress is focused on local exchange carriers as distinctly "new" entrants in established markets and that the lighter regulatory burdens of OVS are designed to level the playing field with established entertainment and information providers, such as cable operators. While cable operators may function down the road as new entrants in the provision of

⁴¹ New Jersey Comments at 5.

⁴² MFS Comments at 25, emphasis added.

telephone service, no one could reasonably characterize them as new entrants in the provision of video entertainment and information services.

D. Local Governments Must Have A Role In The OVS Certification Process To Ensure That Local Communication Requirements Are Met

The City again finds significant support for its firm belief that a valid certification process must include local input. This support comes from a wide range of commentors, including government, industry, community and consumer groups. As an example, Texas Cities indicate that, "Local communities are integral to the OVS certification process. The Act requires both PEG requirements, as previously discussed, and the payment of fees on the gross revenues of the operator. To meet these conditions, local governments must be a part of the process."⁴³ Additionally, as NLC, et al., notes, Congress intended that OVS operators be subject to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner. Accordingly, "An OVS certification must show that the prospective OVS operator has obtained all necessary local consents to use of the rights-of-way for OVS, and any approval of an OVS certification by the Commission should be expressly conditioned on the applicant's having and maintaining those consents."⁴⁴

The cable industry indicates that information sufficient to demonstrate compliance, including information related to compliance with Cable Act provisions relating to PEG access, needs to be submitted as a prerequisite to the filing of certificates.⁴⁵ Time Warner goes further to indicate that, "The operator is not required to certify that it will comply (if

⁴³ Texas Cities Comments at 12 and Footnotes 28 and 29.

⁴⁴ NLC, et al., Comments at 52 and 54.

⁴⁵ NCTA Comments at 37-39.

called upon) but that it does comply."⁴⁶ The only way that compliance could be certified for such distinctly local obligations as PEG access would be with local input in the certification process.

Predictably, the telephone industry wishes to file only simple statements of intent to comply with the Commission's regulations. Certification of intent, though, does not reasonably guarantee an outcome consistent with the Commission's regulations and, therefore, could lead to endless complaints, disagreements and potentially the need to revoke numerous OVS certifications.

E. System Technical Considerations Should Neither Prohibit Access For Existing Services Nor Inhibit Development Of Future Services

The cable industry and the telecommunications industry appear to settle into two different camps on the issue of analog versus digital system capacity. The telephone industry believes that it must have complete discretion in the allocation of different types of system capacity, while the cable industry expresses significant concern about the ability of OVS operators to discriminate against unaffiliated programmers if they are given latitude over the allocation of analog versus digital capacity. The potential for the harmful effects of OVS operator discretion in this area are well expressed by the Coalition when they indicate that, "By tailoring the preferred format space, OVS (operators) can keep a range of programmers off by insisting that they adopt an undesired format."⁴⁷ This and similar comments clearly indicate why it is imperative for the Commission to adopt regulations that ensure access by all programmers to both analog and digital capacity.

⁴⁶ Time Warner Comments at 22 and Footnote 30.

⁴⁷ Coalition Comments at 30.

Additionally, a number of commentators agree with the City's view that institutional networks are included as part of an OVS operator's Section 611 obligations. For example, NLC, et al., states, "If local community needs and interests dictate that the incumbent cable operator must provide an institutional network, then any OVS operator coming into that community must likewise provide an institutional network. See 47 USC Section 531. This result is entirely consistent with both the letter of new Section 653(c)(2)(A) and with the legislative history."⁴⁸ From a regulatory parity and a "no lesser or greater than" obligation perspective, it is clear that the Commission's rules must provide for OVS operator institutional network obligations.

III. CONCLUSION


In summary, after review of a wide spectrum of local government, government organization, community and consumer group, PEG programmer and industry comments, the City finds a large body of support for its initial contentions in this proceeding and thus reemphasizes the conclusions found in its Comments filed with the FCC on April 1, 1996. The City continues to believe, and the evidence shows, that Congress' public interest and program diversity goals for open video systems will not be met unless the FCC incorporates the following elements into its OVS rules:

- OVS operators should provide existing and future PEG capacity, facilities, equipment and operational support that is the same as, or equivalent to, that provided by incumbent cable operators.
- PEG services should be provided to all subscribers to the OVS system regardless of the other programming that they receive.

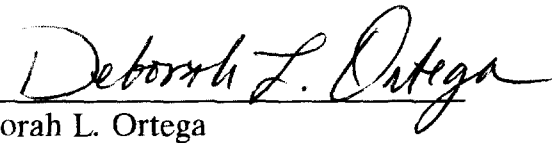
⁴⁸ NLC, et al., Comments at 34 and Footnote 44.

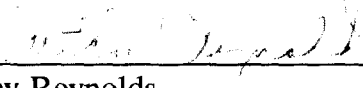
- Cable operators should not be allowed to convert their cable systems into OVS.
- Local governments must have a role in the OVS certification process to ensure that local communication requirements are met.
- System technical considerations should neither prohibit access for existing services nor inhibit development of future services.

Respectfully Submitted,

By: 
Alonzo Matthews
Manager
General Services Administration

City and County of Denver
1330 Fox Street
2nd Floor
Denver, CO 80204

By: 
Deborah L. Ortega
President
City Council

By: 
Cathy Reynolds
City Councilwoman and
Chair, Special Projects Committee

City and County of Denver
City and County Building
Denver, CO 80202

CERTIFICATE OF SERVICE

I, Penny May, Legislative Analyst for the Denver City Council, do hereby certify that a true and correct copy of the foregoing "Reply Comments of the City and County of Denver" was mailed first-class, postage prepaid, this 10th day of April, 1996 to the attached list:


Penny May